

September 10, 2014

Hon. Joseph C. Spero
U.S. District Court, N.D. Cal.
Courtroom G - 15th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *In re Optical Disk Drive Products Antitrust Litig., All Actions*
Case Nos. 3:10-md-2143 RS; 3:13-cv-02124-RS (N.D. Cal.)

Your Honor:

I write on behalf of the undersigned defendants to oppose the entry of the “Stipulated [Proposed] Protective Order Regarding Materials Subpoenaed from the Government,” Dkt. No 1413-1, submitted by counsel for the putative Class Plaintiffs. The process by which Class Plaintiffs submitted the proposed order to the Court was improper because the Class Plaintiffs failed to even raise the issue with undersigned defendants prior to its filing. And as a matter of substance, the proposed order is unfair and unnecessary.

So far as the deposition testimony to date reveals, the only recordings made in the course of the DOJ investigation and at issue in the Class Plaintiffs’ subpoena involved only bilateral communications between employees of specific defendants and did not involve employees of any other defendants, including the undersigned defendants.¹ Accordingly, following the DOJ’s objection to the subpoena, the undersigned defendants did not involve themselves in the discussions with DOJ about whether DOJ would produce the recordings or not.

However, Class Plaintiffs’ letter to the Court wrongly suggests that no defendant other than TSSTK has any interest in this matter. Class Plaintiffs’ proposed protective order does not merely address whether evidence would be produced, but instead limits how defendants may obtain and use that evidence. As set out in TSST-K’s submission, Dkt. No. 1418 at 8-9, the proposed order, if entered, would limit the ability of defendants to use the recordings in an exculpatory manner in the civil cases, including requiring them to disclose to DOJ how the

¹ The undersigned defendants are not aware of whether the DOJ has other responsive material.

evidence would be used in order to try to obtain DOJ's consent, and requiring specific jury instructions. (Dkt. No. 1413-1 at ¶¶ 7.1-7.2.) Class Plaintiffs did not inform any of the undersigned defendants about these potential restrictions on the use of this material before filing their "stipulated" proposed order with the Court.

Class Plaintiffs also wrongly suggest that the defendants have waived their rights by not participating in the meet and confer regarding the subpoena. As noted, the defendants had no notice that a protective order that would limit their use of potentially exculpatory evidence at trial was under consideration. To hold that all the parties in any of the MDL cases waived their rights with regard to the proposed protective order because they did not participate in a discovery meet and confer about the subpoena would as a practical matter require every party in every one of these cases to participate in every discovery meet and confer on every subject because an order limiting their rights with regard to the presentation of evidence at trial may be unilaterally proposed by one of the parties. This would be wasteful and inefficient.

To the extent that material from DOJ is produced, the trial judge can determine at the appropriate time how the material may be used at trial and which jury instructions are relevant, based on their full context including whatever input from DOJ the Court finds it appropriate to consider. It is not only unnecessary but prejudicial to decide any of that now. Accordingly, the undersigned defendants respectfully request the Court deny the Class Plaintiffs' request to enter the proposed order.

Very truly yours,

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Hon. Joseph C. Spero
September 10, 2014
Page 3

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